Dato' Robert Teo Keng Tuan (administering the appeal substituting the personal representative of the estate of the deceased) v Metroplex Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-70–10 OF 2012(W)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, ABDULL HAMID EMBONG AND AHMAD MAAROP FCJJ
21 OCTOBER 2013

Companies and Corporations — Liquidators — Costs — Claim for fees/costs of valuer appointed by liquidator — Whether burden on liquidator to show court amount claimed by valuer justified and reasonable — Whether claim fell under r 173 of the Companies Winding-Up Rules 1972 and not s 232(2) of the Companies Act 1965 — Whether determination of reasonableness of fees/costs claimed within discretion and prerogative of High Court

The appellant was appointed by the High Court as provisional liquidator ('PL') of the respondent to ascertain the alternatives for disposal of a property. She had, inter alia, appointed a Hong Kong-based valuer ('Knight Frank') to prepare a valuation report on the property. On completion of her appointed task, the appellant applied to the court under s 232(2) of the Companies Act 1965 ('Act') to be remunerated for carrying out her job as PL and she submitted, inter alia, the fees and costs charged by Knight Frank. The High Court disallowed that claim holding that there was no evidence to show why it was necessary to appoint a valuer based in Hong Kong to do the valuation when a valuer in Malaysia could have done the job. In that regard the court noted that a report prepared by a valuer in Malaysia earlier to the one done by Knight Frank showed only a marginal difference of 0.98% in the valuation of the property. The High Court also held that no evidence was adduced to show that Knight Frank's fees and costs were competitive or reasonable or whether the respondent's views to the appointment of Knight Frank had been sought. On appeal, the Court of Appeal affirmed the High Court's decision and further held that the PL in breach of her fiduciary duty owed to the respondent to act fairly and objectively failed to ensure the fees/costs claimed by Knight Frank was competitive. In the instant appeal the appellant contended that the order appointing her as PL empowered her to commission any valuation report(s) with regard to the property as she deemed fit and that the costs of such reports were to be paid out of the respondent's assets.

Held, dismissing the appeal with costs:

(1) The question of reasonableness of the costs claimed by the valuer was

essentially a question of fact to be determined by the High Court judge. As the decision was based on the High Court's discretion on a factual issue the instant appeal had no chance of success (see paras 28–29).

(2) The High Court found that with regard to the appointment of Knight Frank no evidence was shown that the respondent's views were sought before the appointment was made; no evidence to show any compelling reason why a valuer in Hong Kong had to be appointed and that a Malaysian valuer could not have done the job; and no evidence to show the fees charged by Knight Frank were competitive. The High Court noted that there was only a marginal difference of 0.98% between the valuations done by Knight Frank and that done by CH Williams. The High Court found the PL had failed to put sufficient information before the Court for it to determine whether the costs claimed were reasonable or justified (see para 23).

(3) Both the courts below were not wrong in coming to the decisions that they did. The issue of reasonableness of the costs claimed by the PL was well within the discretion and prerogative power of the High Court whether to allow or dismiss the same based on the evidence before the court. The High Court had meticulously embarked on a careful judicial appreciation and assessment of the evidence before it, and for good reasons, dismissed the claim for Knight Frank's fees and costs. Likewise, the Court of Appeal had not erred in affirming the High Court's decision (see paras 27–26).

(4) Section 232(2) of the Act only referred to the PL's salary or remuneration and did not apply to fees or costs of the valuer appointed by the PL which was more appropriately applicable under r 173 of the Companies Winding-Up Rules 1972 (see paras 21–22).

[Bahasa Malaysia summary

Perayu dilantik oleh Mahkamah Tinggi sebagai penyelesai sementara ('PS') responden untuk menetapkan alternatif-alternatif untuk penjualan hartanah. Dia telah, antara lain, melantik penilai yang berpusat di Hong Kong ('Knight Frank') untuk menyediakan laporan penilaian ke atas hartanah tersebut. Setelah tugasnya selesai, perayu memohon kepada mahkamah di bawah s 232(2) Akta Syarikat 1965 ('Akta') untuk dia dibayar kerana menjalankan tugasnya sebagai PS dan dia menghujah, antara lain, fi dan kos yang dicaj oleh Knight Frank. Mahkamah Tinggi tidak membenarkan tuntutan tersebut memutuskan bahawa tidak terdapat keterangan untuk menunjukkan mengapa ia perlu untuk melantik penilai yang berpusat di Hong Kong untuk membuat penilaian apabila penilai di Malaysia boleh membuat kerja tersebut. Berkaitan ini mahkamah maklum bahawa laporan yang disediakan oleh penilai di Malaysia terdahulu berbanding dengan satu yang dibuat oleh Knight Frank menunjukkan hanya perbezaan kecil sebanyak 0.98% dalam penilaian

hartanah tersebut. Mahkamah Tinggi juga memutuskan bahawa tiada keterangan dikemukakan bahawa fi Knight Frank adalah bersaingan atau munasabah atau sama ada pandangan responden kepada pelantikan Knight Frank telah diperolehi. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan selanjutnya memutuskan bahawa PS memungkiri tugas fidusiarinya kepada responden untuk bertindak adil dan secara objektif gagal untuk memastikan fi/kos yang dituntut oleh Knight Frank adalah bersaingan. Dalam rayuan ini perayu berhujah bahawa perintah pelantikannya sebagai PS memberinya kuasa untuk melakukan apa-apa laporan penilaian berkaitan hartanah tersebut seperti yang dia fikirkan sesuai dan kos laporan sedemikian dibayar daripada aset-aset responden.

Diputuskan, menolak rayuan dengan kos:

(1) Persoalan kemunasabahan kos yang dituntut oleh penilai ada asasnya persoalan fakta untuk ditentukan oleh hakim Mahkamah Tinggi. Memandangkan keputusan adalah berdasarkan budi bicara Mahkamah Tinggi atas isu fakta rayuan ini tiada peluang untuk berjaya (lihat perenggan 28–29).

(2) Mahkamah Tinggi mendapati bahawa berkaitan dengan pelantikan Knight Frank tiada keterangan ditunjukkan bahawa pandangan responden diperolehi sebelum pelantikan tersebut dibuat; tiada keterangan untuk menunjukkan apa-apa alasan mendorong mengapa penilai Hong Kong perlu dilantik dan bahawa penilai Malaysia tidak dapat membuat tugas tersebut; dan tiada keterangan untuk menunjukkan fi yang dicaj oleh Knight Frank adalah bersaingan. Mahkamah Tinggi menerima bahawa hanya terdapat perbezaan kecil sebanyak 0.98% antara nilaian-nilaian yang dibuat oleh Knight Frank dan yang dibuat oleh CH Williams. Mahkamah Tinggi mendapati bahawa PS telah gagal untuk memberikan maklumat yang mencukupi di hadapan mahkamah untuk ia menentukan sama ada kos yang dituntut adalah munasabah dan berjustifikasi (lihat perenggan 23).

(3) Kedua-dua mahkamah di bawah tidak salah dalam mencapai kepada keputusan yang dibuatnya. Isu kemunasabahan kos yang dituntut oleh oleh PS adalah terangkum budi bicara dan kuasa prerogatif Mahkamah Tinggi sama ada untuk membenarkan atau menolaknya berdasarkan keterangan di hadapan mahkamah. Mahkamah Tinggi telah secara teliti memulakan penelitian dan penilaian kehakiman yang berhati-hati terhadap keterangan di hadapannya, dan atas alasan yang baik, menolak tuntutan untuk fi dan kos Knight Frank. Begitu juga, Mahkamah Rayuan tidak tersilap dalam mengesahkan keputusan Mahkamah Tinggi (lihat perenggan 27–26).

(4) Seksyen 232(2) Akta hanya merujuk kepada gaji atau ganjaran PS dan tidak diguna pakai kepada fi atau kos penilai yang dilantik oleh PS yang

mana adalah lebih wajar dapat digunakan di bawah k 173 Kaedah-Kaedah (Penggulungan) Syarikat 1972 (lihat perenggan 21–22).]

Cases referred to

Australian Securities and Investments Commission v Rowena Nominees Pty Ltd (in liq) (rec and mgr apptd) (supervisor apptd) (ACN008 818 273) (2006) 225 ALR 147; , SC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)

Venetian Nominees Pty Ltd v Conlan (1998) 16 ACLC 1653 (refd)

Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629, FC (refd)

Legislation referred to

Companies Act 1965 ss 232, 232(2), 236(1), (2)
Companies Winding-Up Rules 1972 r 173

Appeal from: Civil Appeal No W-02(IM)-2375 of 2009 (Court of Appeal, Putrajaya)

Ng Sai Yeang (Mark Yu Kee La Brooy and Hew Sheau Ying with him) (Raja, Darryl & Loh) for the appellant.
Wong Rhen Yen (Goik Kenwayne with him) (Dennis, Nik & Wong) for the respondent.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal which affirmed the decision given by the High Court in dismissing the appellant's claim for her appointed valuer's fees.

BACKGROUND FACTS

[2] The appellant was the provisional liquidator ('PL') of the respondent company appointed by the Kuala Lumpur High Court on the 15 June 2006 with a specific mandate ie:

(a) to ascertain the disposal alternatives for Putra Place; and

(b) to submit a report on the current market value of the Putra Place.

[3] After completing her task, the PL then filed an application (encl 134) for remuneration on 12 December 2006 for three prayers:

(a) her remuneration as PL;

(b) her appointed valuer's fees amounting to RM333,919.50 and HKD16,000 respectively; and

(c) her solicitors' fees.

AT THE HIGH COURT/COURT OF APPEAL

[4] The learned High Court judge partially allowed the appellant's claim (encl 134) in that:

(a) prayer 1 (PL's remuneration) was to be referred to the deputy registrar to determine the reasonable amount claimed by the PL; and

(b) prayer 3 in the sum of RM13,047 being her solicitor's costs was also allowed.

[5] But prayer 2 ie the PL's claim for valuer's fees/costs in procuring the valuation report from Knight Frank was dismissed.

[6] The appellant's appeal to the Court of Appeal against this order was also dismissed. Leave was subsequently given by this court to the appellant on the following question:

> Whether in an application under s 232 of the Companies Act 1965, to determine the reasonableness of the amounts sought by a provisional liquidator, the court ought to confine itself to the evidence at hand, relating to the reasonableness of the costs sought in relation to the performance of court's mandate to the provisional liquidator.

THE APPELLANT'S SUBMISSION

[7] Learned counsel for the appellant submitted that the appellant/PL was entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the court, as provided under s 232(2) of the Companies Act 1965.

[8] At stake was a sale of the Putra Place land and the Legend Hotel by the respondent to the Employees Provident Fund which the petitioner/appellant was challenging.

[9] It was contended that there was no dispute that the costs of procuring the mandated valuations were to be borne by the respondent. This was so stated in the High Court order dated 23 May 2006 (see pp 7–13 of the core bundle ('CB')) and the subsequent High Court order dated 15 June 2006 (see 15 of the CB).

[10] Based on the above two High Court orders, the appellant had procured two valuation reports from Knight Frank giving the valuation of the mall and 100 Putra Place together, and the valuation of the Legend Hotel. Knight Frank also issued two separate invoices for the valuations done viz:

(a) RM217,741.40 for the valuation of the mall; and

(b) RM116,178.50 for the valuation of the Legend Hotel.

[11] The appellant's counsel further submitted that according to Schedule A para (g) of the High Court order dated 23 May 2006, the PL is conferred the power, 'To commission any valuation reports as to the value of any of the Putra Place Land as the Provisional Liquidator deems fit and that the costs of such valuation report(s) be paid for by the Respondent out of the assets of the Respondent'.

[12] Counsel also referred to the case of *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd (in liq) (rec and mgr apptd) (supervisor apptd) (ACN008 818 273)* (2006) 225 ALR 147. The Supreme Court of Western Australia, inter alia, held (v):

> Adopting a broad-brush approach, remuneration of $200,000 would be reasonable in the circumstances. This amount made no allowance for the period during which Conlan was acting as liquidator and supervisor, and took into account the amounts already paid to Conlan by GWA. It also took into account the court's conclusion that it was not established that work done since the termination of his appointment as supervisor had been conducted in a way that was of benefit to creditors.

THE RESPONDENT'S CONTENTION

[13] Learned counsel for the respondent however responded by submitting that s 232(2) of the Companies Act refers only to the remuneration of the PL. It does not apply to fees of the valuers appointed by the PL.

[14] He further submitted that the applicable rule is r 173 of the Companies Winding-Up Rules 1972, which reads:

> No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payment for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed

and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer. The taxing officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of $100.

[15] It was also submitted by learned counsel for the respondent that the invoice sent by Knight Frank Petty, dated 31 August 2006, (see AR Vol 5/7 at p 906) RE: METROPLEX MALAYSIA professional fees pertaining to valuation services to review the property under 3.0 of Project Overview (8 hrs x HK$2,000) shows its address as:

Knight Frank Petty Ltd.

4/F Shui On Centre 6-8

Harbour Road Wanchai

Hong Kong

[16] That being so, it was argued that as found in the grounds of judgment of the learned trial judge, that the views of the respondent was not sought in the preparation of the valuation reports and that there was no compelling reason for the appointment of a valuation firm from Hong Kong to do the valuation. There was also no evidence to suggest that a local valuation firm could not have done the same job as the valuer from Hong Kong.

[17] The valuation reports prepared by Knight Frank and the valuation report prepared earlier by CH Williams Talhar, a local firm showed a marginal difference of 0.98% only (see AR Vol 6/7 p 1095).

[18] Reference was also made to the Federal Court decision in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629. In that case, 'the respondents were liquidators of Folin and Brothers Sdn Bhd ('Folin') which was wound up by order of court. The appellants, who owned 75% of Folin's shareholding, applied to the High Court to have the respondents removed as liquidators under s 232 of the Companies Act 1965 ('the Act'). One of the grounds cited in support of their application was that the respondents had paid the bills of lawyers engaged by them to act for Folin without requiring the bills to be taxed pursuant to r 173 of the Companies (Winding-Up) Rules 1972. The bills in question related to litigation matters that involved the appellants, the respondents, Folin and its wholly-owned subsidiary, Folin

Food. The High Court dismissed the application and with regard to the ground concerning the taxation of the bills, it held that r 173 only applied to services rendered by an advocate in assisting a liquidator perform his ordinary administrative and management duties as envisaged by s 236(1) of the Act. The services for which the lawyers were engaged in the present case were for defending an action on Folin's behalf under s 236(2) of the Act. Furthermore, the cheques for payment of the lawyer's bills were signed by the respondents only after the appellants had approved the payments. The Court of Appeal upheld the High Court's decision on appeal. The appellants were granted leave to appeal to the Federal Court.

Held: (1) Rule 173 was meant to only apply to services envisaged under s 236(1) of the Act. It was clear the services referred to were those rendered to the liquidator in the performance of his ordinary administrative and management duties. In the present case, the advocate's services were for bringing and defending action on behalf of Folin under s 236(2) of the Act. Therefore, they did not fall under r 173 (see paras 15 and 17)'.

THE COURT'S DECISION

[19] The central issue in the leave question is the determination whether the costs sought by a PL is reasonable or otherwise in relation to the performance of the court's mandate to the PL.

[20] The appellant based her application on s 232(2) of the Companies Act 1965 which states:

> (2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

[21] We agree with learned counsel for the respondent that s 232(2) of the Companies Act 1965 only refers to the PL's salary or remuneration. It does not apply to fees or costs of the valuer appointed by the PL.

[22] Such fees of the valuer so appointed by the PL can be more appropriately applicable under r 173 of the Companies Winding-Up Rules 1972 which reads:

> No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payments for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the Taxing Officer. The Taxing Officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the

liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of RM100.

[23] As to the appointment of Knight Frank, the learned High Court judge found that there was no evidence to show that the views of the respondent were sought before the appointment was made. Nor was there any evidence to show any compelling reason for the appointment of a valuation firm from Hong Kong to do the valuation. It was also not shown that a local Malaysian valuation firm could not have done the job. There was also no evidence to show that the fees charged by Knight Frank were competitive. The learned High Court judge further observed that there was also a marginal difference of 0.98% only between the valuation done by Knight Frank and that by CH Williams. Having scrutinised the evidence before him, the learned High Court judge said that the burden was on the PL/appellant to show that her remuneration was justified and therefore the PL was on an obligation to put sufficient information before the court to determine whether the costs are reasonable (see *Venetian Nominees Pty Ltd v Conlan* (1998) 16 ACLC 1653) at p 1657. This the learned judge found the PL had failed to do.

[24] On the appointment of Knight Frank by the PL to prepare the reports, the Court of Appeal held that the learned High Court judge had correctly dismissed the PL's claim for the reasons as stated in his grounds of judgment as mentioned earlier. It further held that it must be stressed that the PL, once appointed, owed the respondent a fiduciary duty to act fairly and objectively in the interest of the respondent. The Court of Appeal agreed that the learned High Court judge had correctly concluded that in breach of their fiduciary duty the PL had failed to ensure that the fees was competitive.

[25] As submitted by learned counsel for the respondent, the appellant's solicitors themselves had conceded that there was no evidence in the affidavit to show that the liquidator has made any effort to look for alternative buyers of the property besides what was mentioned in the valuation report.

[26] We also agree with the respondent's counsel's submission that the issue of reasonableness of the costs incurred is well within the discretion and prerogative power of the learned High Court judge whether to allow or dismiss the PL's claim based on the evidence before the court. And the learned High Court judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced before the court and for good reasons dismissed prayer 2 in the PL's application. Likewise we find the Court of Appeal had not erred in affirming the said decision of the High Court.

[27] We find both the courts below were not wrong in coming to that decisions as they did. As such there is no reason for us as the apex court to interfere (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[28] The question of reasonableness of the costs of the valuer is essentially a question of fact to be determined by the trial judge. As stated by this court in the case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25:

> Held, (5) Once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel.

[29] As stated earlier, we find no reason to disagree with the decision of the Court of Appeal in affirming the decision of the High Court in this matter. We therefore find it is unnecessary to answer the question posed before us as the appeal has no chance of success being a decision based on the discretion of the High Court on a factual issue.

[30] For the above reasons, we would dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar